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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 251.

PANAMA CANAL COMPANY,

Petitioner,

v.

GRACE LINE, INC., *et al.*,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION.

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POINT I.

The petition is based upon a major distortion of the issues: there has been no "novel interpretation of the Government Corporation Control Act."

The theory of the petition seems to be that what is involved here is a little argument over accounting practices between the petitioner* and the Comptroller General in which neither the courts nor the respondents** have any right to meddle.

And accordingly the petition asks this Court to review an alleged "novel interpretation of the Government Corporation Control Act" (Petition, p. 22) by which the Court

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* Hereinafter referred to as "defendant".

** Hereinafter referred to as "plaintiffs".

of Appeals is supposed, in the name of that Act, to have inflicted the views of the Comptroller General on defendant.

This "novel interpretation of the Government Corporation Control Act" is simply non-existent. What the Court of Appeals did was on its own responsibility to construe the Act of September 26, 1950 as requiring the defendant to prescribe tolls based on Canal operations and without regard to the collateral activities—merely mentioning the similar views of the GAO by way of background (Petition, pp. 47-48).

The Court of Appeals did not hold and the plaintiffs did not maintain or even intimate that the GAO interpretation of the statute as requiring the prescription of tolls without regard to the losses of the collateral activities was binding on defendant. The Court of Appeals decided and plaintiffs argued the meaning of the statute on the merits.

Defendant's theory has forced it to make a statement of the controversy which is not correct and is not supported, indeed, is contradicted, by its record citations, as follows (Petition, pp. 11-12):

> "The Comptroller General's reports on the Panama Canal Company for the years 1954[30] and 1955[31] expressed the view that the Panama Canal Company had allocated to the canal operations too high a share of the cost of the Canal Zone Government, corporate overhead and interest payments, and an inadequate one to its supporting activities, most of which formerly had been administered by the Panama Railroad Company."

The Comptroller General expressed no such view in his 1954 and 1955 reports, and could not have, for the reason that defendant had, in 1954, made no allocations, and in 1955, refused to make its cost allocations available to the GAO auditors.

Thus the Comptroller General's 1954 report, cited in footnote 30, stated at p. 2 (p. 33a of the appendix to defendant's brief in the Court of Appeals):

> "However the Company did not have available for our examination an analysis to determine the financial results by activities."

The Comptroller General's 1955 report, cited at footnote 31, stated at p. 18 (this passage not included in any appendix):

> "During our 1955 audit we again requested the Company to furnish an analysis of financial results by activity. Although we were informed that an analysis had been prepared, it was not made available for our use."

The straw from which defendant seeks to create this false issue is prayer No. 4 of the complaint (8a) and of the motion for summary judgment (12a), asking that defendant in prescribing tolls use "accounts not less favorable to plaintiffs and their class than those determined by the General Accounting Office." As the context of both the complaint and the motion made clear (cf. 3a), that prayer was intended to apply only *after* the courts held, as a matter of construction of the Act of September 26, 1950, that it was defendant's duty to prescribe tolls on Canal operations only. However, the theory of prayer No. 4 was regarded as premature for presentation to the Court of Appeals; no arguments in its support were ever submitted to that Court and necessarily no such contention or theory was ever ruled on or upheld by that Court.

Thus when defendant seeks review of what it calls a "novel interpretation of the Government Corporation Control Act" (Petition, p. 22), it is asking this Court to review a ruling—novel or otherwise—that does not exist.

POINT II.

The Courts do not lack power to compel Government proprietary agencies to perform legal duties owed the citizen, and plaintiffs by virtue of Article III, Section 1, of the Hay-Pauncefote Treaty, both *per se* and by reason of its incorporation in Section 412, have the right to transit the Canal at the rates there defined.

Defendant's principal legal point appears to be that the courts cannot compel Government agencies to act in matters concerning Government property, relying on *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113.

But no one has a right to sell steel to the Government. The fixation of terms for bids is intra-governmental.

The courts have repeatedly given citizens relief when those citizens have legal rights against Government agencies, including agencies in control of Government property. For many years a substantial proportion of the cases before this Court involved suits to compel the Secretary of the Interior to recognize land claims. Government corporations control Government property, and they are now almost always, if not invariably, subject to suit. And in this case, plaintiffs have a legal right to transit the Canal at "just and equitable" rates by virtue of Article III, Section 1 of the Hay-Pauncefote Treaty, both *per se* and by reason of its incorporation in Section 412. That section of the Hay-Pauncefote Treaty reads as follows:

> "The canal shall be free and open to the vessels of commerce and war of all nations observing these Rules, on terms of entire equality, so that there shall be no discrimination against any such nation, or its citizens or subjects, in respect of the conditions or charges of traffic, or otherwise. Such conditions and charges of traffic shall be just and equitable."

Congress having defined "just and equitable" rates in Section 412, plaintiffs have the right to transit the Canal at the rates so defined.

POINT III.

The case falls within the rules for mandatory relief.

Defendant urges that the statutory construction is not sufficiently clear for mandatory relief.

In the cases cited by defendant the administrative officer or body had expertise in the construction of the statutes at issue. Defendant, as such, has no experience in statutory construction and its only official with legal expertise, viz., its General Counsel, appears to have interpreted the statute in the same way as the Court of Appeals, the General Accounting Office and plaintiffs, as demonstrated in plaintiffs' cross-petition at pp. 12-13. Indeed in this petition itself defendant so lacks confidence in its own theory of the statutory meaning that it is forced to raise false issues such as "novel interpretation of the Government Corporation Control Act" and alleged GAO criticism in 1954 and 1955 of its cost allocations—allocations that were not criticized, if for no other reason, because nobody knew what they were.

Again, this defendant, unlike the Government agencies involved in the cases cited by defendant, has expressly been made subject to suit "like any private corporation" (cross-petition, p. 27). *Virginia Ry. Co.* v. *Federation*, 300 U. S. 515, is conclusive that private corporations are subject to mandatory court orders to compel the performance of statutory duties as those duties are construed by the courts. Defendant cites no case in which a Government corporation subject to suit has been given the benefit of the rule upon which it relies.

Conclusion.

The petition should be denied.

Plaintiffs submit that defendant has not seriously challenged the opinion of the Court of Appeals and that argument in this Court should be limited to the questions raised by the cross-petition.

Defendant's failure to comply with the statute is costing plaintiffs and their class $25,000 a day. Because a stay has been granted, so long as the petition is pending there will not be, as put by the Court of Appeals, "even a beginning in the lengthy steps necessary toward compliance with the court's order" (cross-petition, Appx. B, 26). Plaintiffs urge that the petition be denied so that these "lengthy steps" may begin.

July, 1957.

Respectfully submitted,

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